No. 90-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JERRY TUCKER,

Petitioner,

v.

OWEN BIEBER and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION FOR BIEBER & UAW

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The "90-day" rule requires *appointed* UAW staff to take a 90-day leave of absence if they run against the incumbent Regional Director under whom they serve. If unsuccessful, they are reassigned, and not discharged. Petitioner Tucker, holding the senior political appointment in the Southewestern United States, announces less than one month before the election, and is fired for violation of this rule. However, he is *not* prohibited from running. In the same round of elections, three other appointed staff observe the rule. One wins, and two are reassigned.

1. Under the settled principles of *Finnegan v. Leu*, 456 U.S. 431 (1982) and *Sheetmetal Workers v. Lynn*, 488 U.S. 347 (1989), distinguishing the cases of appointed and elected officials, did the courts below correctly apply *Finnegan*?

2. Does § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, confer federal jurisdiction on an action *by a member* alleging breach of the UAW CONSTITUTION, as a contract?

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Owen F. Bieber,[1] its President, by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari.*

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[1] Here after, jointly referred to as the "UAW" or "Union".

COUNTERSTATEMENT OF THE CASE

The best statement is that of the Sixth Circuit, relying on the District Court.[2] It has the added advantage of being neutral:

Jerry Tucker held an *appointed* position on the UAW staff, as Assistant Director of Region 5. This is the senior political and administrative appointment in the Southwestern United States, serving under Ken Worley, the elected Regional Director.[3]

Since 1973, the UAW has had a "90-day leave" rule.[4] The rule requires appointed UAW staff to take a 90-day leave if they run against the incumbent Director who appointed them. It was adopted "to promote democratic competition within the union's structure by assuring staff members that they can retain their appointed staff positions if they fail to be elected to office." [5] In contrast, federal regulations, 29 C.F.R. § 452.48 (1989), permit unions to prohibit appointed employees from running for office.[6]

In 1986, Petitioner Tucker, announced his candidacy against Worley *less than one month* before the election,

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[2] *Tucker v. Bieber*, 900 F.2d 973, 974-76 (6th Cir. 1990), *reprinted* in the Addendum to the Petition, at 1a-15a, *affirming*—F. Supp.—(E.D. Mich. 1989), 131 L.R.R.M. (BNA) 2979 & 2987, *reprinted* 16a-40a.

[3] 900 F.2d at 975, or 3a-4a.

[4] *See, Brandt v. UAW (Brandt II)*, PRB No. 787 II (1988), *reprinted* 41a-60a, *esp.* 45a-46a.

[5] 900 F.2d at 979, or 12a.

[6] 900 F.2d at 979, 12a. The regulation provides, 29 C.F.R. § 452.48: "A labor organization may in its constitution and bylaws prohibit members who are also its full-time non-elective employees from being candidates for union office, because of the potential conflict of interest arising from the employment relationship which could be detrimental to the union as an institution."

and was fired for violation of this rule. However, he is *not* prohibited from running. In the same round of elections, three (3) other appointed staff observed the rule. One was elected, and two were reassigned.[7]

Even so, Tucker ran a vigorous campaign, and lost by the narrowest of margins, 324.577 to 324.415.[8]

Tucker then protested the election to the Secretary, who succeeded in persuading the (same) District Court to order a rerun.[9] Tucker won the rerun, and served until the 1989 UAW Convention. In 1989, Tucker lost by a 2-1 margin to Roy Wyse, another staff member who had taken a 90-day leave.[10] On appeal of the Secretary's election cases, the Sixth Circuit held that intervening events had mooted the cases, and vacated. *Brock & Tucker v. UAW*, 889 F.2d 685 (6th Cir. 1989).

Meanwhile, in the instant litigation, one of the other staff who had taken the 90-day leave, Brandt, challenged the "90-day leave" rule before the Public Review Board (PRB). That body consists of independent, senior scholars, and has final appellate authority under the UAW CONSTITUTION.[11] The Public Review Board upheld the

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[7] 900 F.2d 978, 9a. The Sixth Circuit was moved to observe, ironically, "[t]hough Tucker seems incapable of remembering it, he nearly defeated Worley in the election, and another challenging appointee won his race." 900 F.2d at 978-79, 11a. Understandably, Tucker's cognitive dissonance continues in his Petition.

[8] 900 F.2d at 975, 978-79, or 4a & 11a.

[9] *Brock & Tucker v. UAW*, 682 F. Supp. 1415 (E.D. Mich. 1988) (Suhrheinrich, J.). The Secretary attacked the "90-day leave" rule in this litigation, but only on the ground that it was not properly adopted. The District Court did not reach this claim, holding the issue moot as the rerun had already been ordered on other grounds. Tucker's margin over Worley was 34 votes, 362.2 to 327.8, *Brock & Tucker v. UAW*, 889 F.2d 685, 689 (6th Cir. 1989).

[10] *Brock & Tucker v. UAW*, 889 F.2d 685, 689 (6th Cir. 1989).

[11] 41a, "Panel Sitting": Rev. Msgr. George G. Higgins, of Catholic University, the U.S. Catholic Conference; Prof. Benjamin Aaron,

rule, leading Tucker to intervene and obtain reconsideration. The Board heard from Tucker's counsel, as well as those who adopted and promulgated the rule.[12] They then issued a lengthy decision, addressing the various factual and interpretative arguments advanced.[13]

The District Court held, on cross-motions for summary judgment, that Tucker had lost no *membership* rights under *Finnegan*, because tenure in an *appointed* staff job was not a membership right under § 101, 29 U.S.C. § 411. In this the Court expressly followed *Finnegan v. Leu*, 456 U.S. 431 (1982). The Court then found the Public Review Board's findings, both on facts and the meaning of the UAW CONSTITUTION, were fair and reasonable. The "90-day leave" rule, held the Court, is "a valid and binding provision of the UAW CONSTITUTION." (33a) The District Court held that "the 90-day rule is constitutional and reasonable," so "it provided a legitimate basis for Tucker's discharge and was not a deliberate attempt to stifle dissent within the Union. (35a) While obedient to the Sixth Circuit's holding in *Trail v. IBT*, 542 F.2d 961 (6th Cir. 1976), that § 301, 29 U.S.C. § 185, does not confer jurisdiction in a suit by individuals for violations of their union constitution, the District

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UCLA School of Law; Prof. James E. Jones, University of Wisconsin Law School; Hon. Frank W. McCulloch, Prof. *Emeritus*, University of Virginia Law School, and formerly Chair of the National Labor Relations Board; Dr. Jean T. McKelvey, Cornell University, School of Industrial & Labor Relations; Prof. Theodore J. St. Antoine, University of Michigan Law School, and formerly Dean; and Prof. Paul C. Weiler, Harvard University Law School. *See also, Monroe v. UAW*, 723 F.2d 22, 24 n.3 (6th Cir. 1983), or *Wagner v. General Dynamics*, —— F.2d —— (6th Cir. 1990), 134 L.R.R.M. 2444, 2446 (BNA).

[12] This is recited in the Public Review Board's decision on reconsideration, *Brandt v. UAW*, PRB No. 787 II, at 43a-48a. The witnesses included Leonard Woodcock, Douglas Fraser, and Patrick Greathouse.

[13] *Brandt v. UAW*, PRB No. 787 II, *reprinted* at 41a-60a.

Court explicitly found that, even so, there was *no breach* of that "contract." (37a) When *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), came down, the District Court reviewed and reaffirmed its holdings, finding that *Lynn* reaffirmed *Finnegan* as to appointed officials. (16a-19a)

On appeal, the Sixth Circuit affirmed, carefully following the distinction between appointed and elected union officials established in *Finnegan* and *Lynn*,[14] and holding that Tucker had not been injured in any *membership* rights. Like the District Court, the Sixth Circuit approved the Public Review Board's findings, holding there was not breach of "contract".[15] It declined to depart from *Trail* on the question of whether § 301 jurisdiction should be extended to individual actions on union constitutions, although aware of divergent judicial opinion on the point.[16]

ARGUMENT

This litigation, like most, is of intense importance to those directly involved. The legal issues, nevertheless, are prosaic, and are cast up in a context which is both fact-specific and otherwise ill-suited for this Court's review.

I. *Finnegan* and *Lynn*

Like Tucker, and probably everyone else, we are firmly convinced of the need for a vital democracy in the union movement. The importance of those issues lead this Court to take *Finnegan* in the first place. But, having taken *Finnegan* and decided it, there is no need to take it again.

Certainly, there is no need to revisit such a precedent in order to explore the finer points of some "chilling effect", visited upon an *appointed* member of the union's staff, who wants to be paid to run against the very

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[14] 900 F.2d at 977-79, or 7a-11a.

[15] 900 F.2d at 979-80, or 11a-13a.

[16] 900 F.2d at 980, or 14a.

elected officials who appointed him. Yet, in the end, this is precisely the reason Tucker gives for granting the writ.

Finnegan resolved the case of an *appointed* union official, holding that democracy was served, not retarded, by allowing elected officials to remove disloyal staff. There is no membership right to appointed union office. 456 U.S. at 441. The Court did not reach two issues—whether the same rule should apply to the removal of *elected* officials, and whether some very low-level appointees might be exempt. 456 U.S. at 44 n. 11. The Court was also careful to reserve on whether a Title I action might arise where the removal was "part ~~of a purposeful and~~ deliberate attempt . . . to suppress dissent." 456 U.S. at 441.

In 1989, the Court settled the question of the removal of *elected* officials in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989). In so doing, the Court did not reexamine *Finnegan*, but built on it. The whole analysis of *Lynn* is framed on the contrast between appointed and elected officials:

> In *Finnegan*, this goal was furthered when the newly elected union president discharged the appointed staff of the ousted incumbent. Indeed, the basis of the *Finnegan* holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs. While such patronage-related discharged had some chilling effect on the free speech rights of the business agents, we found this concern outweighed by the need to vindicate the democratic choice made by the union electorate.
>
> The consequences of the removal of an elected official are much different. [488 U.S. at ——, 109 S.Ct. at 644]

Where an elected official is removed, "the union members are denied the repersentati[redacted] their choice" and de-

prived "of his leadership, knowledge and advice. . ." 488 U.S. at ——, 109 S. Ct. at 645.

Finnegan and *Lynn*, then, recognize that some "chilling effect" can occur. But the Court implements the Congressional intent by settling upon a practical, demoncratic distinction. The removal of an *appointed* official does not violate membership rights, protected under § 101, but the removal of an *elected* official generally does.[17]

These precedents leave the Circuits with clear guidance, which, as this case indicated, they have no trouble following. There is no call to regress into confused and uncertain speculations about "chilling effect."

II. Section 301

In *Plumbers v. Plumbers Local 334*, 452 U.S. 615 (1981), this Court held that, as between a Local and an International Union, § 301 conferred jurisdiction to sue on the union constitution as a "contract". Such a case was a contract suit, literally, "between any such labor organizations." 29 U.S.C. § 185(a). The Court expressly reserved the question of § 301 jurisdiction in suits by individuals.[18]

We acknowledge, as did the Sixth Circuit, that the Circuits have since split on this particular issue.

This is not the vehicle, however, to resolve that split. There are several reasons:

First, it would be a futile exercise. The courts below independently held, as did the Public-Review Board, that there was no breach of the UAW CONSTITUTION here.

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[17] From his concurrence, Justice White alone indicated discomfort with such a "bright line" approach. 488 U.S. at ——, 109 S. Ct. at 647.

[18] "We also do not need to decide whether individual union members may bring suit on a union constitution against a labor organization . . . (citing the Circuit split)." 452 U.S. at 627 n.16.

Tucker is wrong on the facts, and is wrong on his interpretation of the UAW CONSTITUTION and its history. Traditionally, it is the task of *inferior* federal courts to clear such swamps.

Second, the gravamen of this litigation is the *Finnegan* issue, not a refined point of § 301 jurisdictional construction. *Finnegan* is an adequate ground for the result below. Resolution of this "case or controversy" would be retarded, not advanced, by reaching into a minor subplot to resolve a ten year old jurisdictional point.

Third, and last, such individual "contract" claims on union constitutions are notoriously fact-specific. They arise in a range of disputes. The more interesting involve things like ratification of labor agreements (*e.g.*, *Trail*), where the union refuses to provide dispute resolution tribunals. In practice, cases like the instant one, involving union employment, are born and die as § 101 (a) actions under the LMRDA. The only real difference is that the Sixth Circuit requires this, but some other Circuits do not. Such a difference is one of emphasis, rather than a vigorous split. It will likely mature out of existence without the attention of this Court. If it does not, no harm is done.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to *deny* the Writ.

Respectfully submitted,

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